

LCRO 161/2016

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of Auckland Standards Committee 3

BETWEEN

XS

Applicant

AND

VS

Respondent

DECISION

The names and identifying details of the parties in this decision have been changed

Introduction

[1] Mr XS has applied for a review of the determination by Auckland Standards Committee 3 (the Committee) that Mr XS' conduct constituted unsatisfactory conduct by reason of breaches of rr 9 and 9.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[2] The underlying issue of concern to Mr XS is best recorded by including part of the submissions made by Mr JK on behalf of Mr XS:

There has been much controversy in the profession about the inclination of Standards Committees to adopt a quantum leap from determining that there should be a fee reduction on the one hand to then elevate that to a determination of "*unsatisfactory conduct*".

This case well illustrates the point that an adverse determination remains a very serious matter for the practitioner and one which, in terms of record, will remain with him forever.

Background

[3] The Committee's determination contains a full discussion of the facts giving rise to Mr VS' complaints and it is not necessary to repeat them here in detail. Briefly, Mr XS acted for [Company A]. [Company A] went into liquidation on 21 April 2015. Mr VS was appointed liquidator on 29 July 2015, having replaced Mr RT.

[4] Mr XS had lodged a claim for outstanding fees on 8 June 2015. The invoice was rendered for "professional services" in relation to three matters. Mr VS sought details from Mr XS as to what work had been carried out and the time expended in carrying out the work. He was not satisfied with Mr XS' responses and sought a "costs revision" from the Lawyers Complaints Service.

The Standards Committee determination

[5] The Committee identified the following issues to be addressed:¹

- (a) Were the fees charged by Mr XS fair and reasonable?
- (b) Did Mr XS file an unsecured creditors claim in relation to his fees which was inconsistent with a draft settlement statement issued to [Company A] on 30 April 2015? If so, do any professional standards issues arise?
- (c) Did Mr XS permit his client to uplift all of [Company A]'s legal files and destroy them (without keeping copies)?
- (d) Did Mr XS fail to answer Mr VS' request for details about what work he undertook and how he calculated his account?

[6] In respect of each matter the Committee made the following comments/determinations:

*Fees:*²

The Committee carefully considered the material provided by the parties, including Mr XS' limited explanation of his fees. The Committee did not consider that Mr XS could justify the fee that he had charged. He was unable to provide the Committee with any time records or files relating to the transaction, Mr XS does not retain time records and the files were no longer held by Mr XS and it appears no longer held by the client. This made it difficult for the Committee to assess the reasonableness of the fee with reference to not only the time and labour expended but the majority of the reasonable fee factors.

¹ Standards Committee determination (27 June 2016) at [7].

² At [9]–[11].

... The Committee noted Mr XS' obligation pursuant to rule 9.6 of the RCC to render a final account and the need for Mr XS to provide with the account sufficient information to identify the matter, the period to which it relates and the work undertaken. In the Committee's view Mr XS had failed to charge a fee that was fair and reasonable for the services provided and breached rule 9.6 of the RCCC.

The liquidator suggested that a more reasonable fee for the type of work that Mr XS suggested that he had completed for the sale and purchase would be in the vicinity of half the fees charged by Mr XS in his invoice. The Committee tended to agree having regard to their own experience in commercial matters and the fee customarily charged for similar legal services. While Mr XS appeared to claim that further work was completed, he provided no tangible evidence that the Committee could consider in determining the reasonableness of any further fees incurred.

[7] The Committee found Mr XS had breached rr 9 and 9.6 of the Rules and made a finding of unsatisfactory conduct.

*Claim inconsistent with draft settlement statement:*³

The Committee considered that it was quite clear that any work undertaken by Mr XS after [Company A] was placed into liquidation and Mr VS was appointed as liquidator could only have been completed by Mr XS if he was instructed by the liquidator, which he was not. While it appeared that Mr XS had continued to work for [Company A] once it was placed into liquidation (presumably on instruction from the previous liquidator) and was therefore claiming for fees that were not properly incurred by [Company A] prior to liquidation, the Committee considered that its assessment of the fees above adequately addressed this concern.

[8] The Committee determined to take no further action in respect of this issue.

*Uplifting files:*⁴

Mr XS' obligation with respect to [Company A]'s documents was that they must either be returned or dealt with as instructed by the client. There is no further obligation on Mr XS to retain copies of the documents. The Committee accepted Mr XS' advice that his client uplifted the files before the liquidation and that he does not keep copies of non-contentious files. While Mr VS appeared to dispute whether the file could be considered non-contentious, Mr XS had not breached professional standards by allowing representatives of [Company A] to uplift the legal file.

[9] The Committee determined to take no further action in respect of this issue.

*Mr VS' request for information:*⁵

With respect to Mr VS, while he may not have been satisfied with the answer that Mr XS provided to him regarding the work undertaken, Mr XS did not hold any

³ At [14].

⁴ At [17].

⁵ At [20].

time records that could assist Mr VS. He answered Mr VS' questions and his responses cannot be said to amount to a breach of professional standards. Accordingly, the Committee determined pursuant to section 152(2)(c) of the Act to take no further action on this issue.

Penalty

[10] Having made the finding of unsatisfactory conduct with regard to Mr XS' fee, the Committee made the following orders:⁶

- (a) Mr XS is censured pursuant to s 156(1)(b) of Lawyers and Conveyancers Act 2006 (the Act);
- (b) Mr XS is ordered pursuant to s 156(1)(e) of the Act to reduce his fee for work in relation to the [Company A] matter by 50% from \$17,365.00 (including GST and disbursements) to \$8,682.50 (including GST and disbursements); and
- (c) Mr XS is ordered pursuant to s 156(1)(n) of the Act to pay to the New Zealand Law Society an amount of \$1,000.00 in respect of costs and expenses.

Review

[11] This review has been completed on the material to hand with the consent of both parties.

The finding of unsatisfactory conduct

[12] The Committee did not "elevate" its view that Mr XS' fee was not fair and reasonable into one of unsatisfactory conduct. A determination that a lawyer's fee is not fair and reasonable constitutes a breach of r 9 of the Rules. A breach of the Rules constitutes unsatisfactory conduct pursuant to s 12(c) of the Act. An order that a lawyer reduce his or her fees can only be made pursuant to s 156(1)(e) of the Act following a finding of unsatisfactory conduct pursuant to s 152(2)(b).

[13] This Office accepts that a finding of unsatisfactory conduct is viewed seriously by (most) lawyers.⁷ As noted by Mr JK, it is a finding which remains on a lawyer's record forever.

⁶ At [25].

⁷ LCRO 101/2010 at [20].

[14] There have been instances where a lawyer has been prepared to voluntarily reduce his or her fees to avoid the imposition of a finding of unsatisfactory conduct. That is a matter of discretion to be exercised by a Standards Committee or this Office. In some instances, an offer to voluntarily reduce a fee has been viewed by this Office as an attempt by the lawyer to “buy” his or her way out of an adverse finding.⁸ In those circumstances the offer will not be accepted. In any event, I cannot find a specific proposal by Mr XS or Mr JK suggesting a voluntary reduction of the fee.

[15] *BI v CW* involved the same issues that Mr JK raises. In that case, the Standards Committee determined that the lawyer’s conduct constituted unsatisfactory conduct notwithstanding that the lawyer had sought an independent peer review prior to rendering his account, and the independent lawyer had come to the view that the lawyer’s bill was fair and reasonable. Comments made in that decision are equally applicable to this review and a copy of that decision is provided to the parties with this decision.

Rule 9.6 of the Rules

[16] Rule 9.6 of the Rules provides:

A lawyer must render a final account to the client or person charged within a reasonable time of concluding a matter or the retainer being otherwise terminated. The lawyer must provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken.

[17] Mr XS’ bill was for professional services in relation to [Trust A address]. It contained no further information and Mr VS did not find Mr XS’ responses to his questions to be satisfactory.

[18] This breach of r 9.6, in itself, supports a finding of unsatisfactory conduct.

Should discretion be exercised?

[19] Standards Committees have a discretion as to whether or not to make a finding of unsatisfactory conduct notwithstanding breaches of the Act or the Rules.⁹

[20] When considering whether or not to make a finding of unsatisfactory conduct, the circumstances leading to the conduct complained of need to be examined. In addition, whether or not there is an appropriate alternative remedy available to the complainant also needs to be considered.

⁸ *BI v CW* LCRO 23/2012 at [46].

⁹ Lawyers and Conveyancers Act 2006, s 138.

[21] Mr XS says he does not keep time records. Whilst Mr JK's submission that it is not mandatory to do so is accepted, the time and labour expended on a matter is one of the relevant factors to be taken into account by a lawyer and those charged with reviewing a lawyer's fee when forming or reaching a view as to whether a fee is fair and reasonable.¹⁰

[22] The most obvious, and common, means of keeping a record of time expended on a matter is by the lawyer keeping daily time sheets. This has been the case for many years including the years prior to introduction of electronic records into law firms.

[23] Mr XS says he spent in excess of 100 hours on the matters billed but has provided no further information to enable either the liquidator, the Committee, or this Office to reference this to actual work completed.

[24] Mr XS himself is unable to do so because all of his files were uplifted by his client prior to the liquidation and have now been destroyed. It is surprising Mr XS relinquished his lien over the files while there remained significant unbilled work. It is also surprising because it seemingly removed Mr XS' means of properly assessing what fees were outstanding.

[25] However, without time records or the files, there is nothing which Mr XS can provide to support his fee.

[26] The Committee is faced with the same problem. There is no information on which it can form a view as to whether Mr XS' fee was fair and reasonable. The Committee accepted Mr VS' submission that the fee should be no more than half the amount billed, but that is nothing more than an arbitrary figure produced by Mr VS. Mr VS has little, or no, information to enable him to assess what work Mr XS carried out, which in turn, would enable him to form a view as to what a fair and reasonable fee for the work would be.

[27] This presents something of a conundrum for all concerned, but there must be evidence on which to base an adverse finding.

[28] Mr VS was pursuing Mr XS' clients to achieve a recovery for creditors and he draws the inference that Mr XS was complicit with his clients in their endeavours to defeat the claims.

¹⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.1(a).

[29] However, disciplinary findings cannot be based on inferences. There must be evidence available on the balance of probabilities to support the finding which does not exist in this instance.

An alternative remedy

[30] Section 138(1)(f) of the Act provides:

- (1) A Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee,—

...

- (f) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person aggrieved to exercise.

[31] It is a little puzzling that Mr VS has chosen to pursue a remedy through the complaints procedure when as a liquidator, he has adequate remedies available to him,¹¹ which may be readily exercised.

[32] In the circumstances, that was an adequate remedy for Mr VS to pursue.

Conclusion

[33] In all of the circumstances, I have reached the view that the finding of unsatisfactory conduct cannot stand. There is no evidence to support a finding that Mr XS' fee is not fair and reasonable, and while there is no doubt that r 9.6 has been breached, there are no grounds to reject the explanation provided by Mr XS as to why he is unable to provide the information required. Section 304 of the Companies Act 1993 provided an adequate remedy for the liquidator to take.

[34] Although the remaining findings of the Committee have not been specifically discussed, they have been considered, and are confirmed, excepting the comment in [14] that Mr XS was claiming for work carried out post liquidation.¹² The lack of information prevents this issue from being resolved also.

¹¹ Section 304 of the Companies Act 1993.

¹² Standards Committee determination, above n 1.

Decision

[35] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the finding of unsatisfactory conduct is reversed. All orders made consequently fall away.

[36] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the remainder of the Committee's decision is confirmed.

DATED this 31st day of January 2018

D Thresher

Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr XS as the Applicant
Mr VS as the Respondent
Mr JK as Applicant's representative
Auckland Standards Committee 3
New Zealand Law Society